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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN ELLIOTT FIELDS,

Defendant and Appellant.

F057804

(Super. Ct. No. 08CM7005)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Kevin Elliott Fields is a prisoner in the secured housing unit at Corcoran state prison (prison). On September 14, 2007, he used the library. Correctional officers Jose Maciel and Armando Aguirre came to the library to escort appellant back to his cell. Appellant argued with a library assistant over the return of a document. Maciel told appellant, who was handcuffed, that it was time to leave. Appellant shoved Maciel in the chest and kicked him repeatedly. Despite Maciel's application of pepper spray, appellant continued to resist and repeatedly kicked Maciel.

Appellant was found guilty after jury trial of two counts of battery on a nonconfined person. (Pen. Code, 4501.5)¹ He admitted two prior strikes and three prior prison term allegations. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d); 667.5, subd. (b).)

Appellant represented himself at trial. He filed a posttrial written motion requesting appointment of counsel to file a new trial motion. The request was granted and counsel was appointed for purposes of determining whether there was a ground for a new trial motion and, if there was, to bring such a motion, and to represent appellant at sentencing. Counsel determined there was no viable basis for a new trial motion. Appellant then threatened to sue counsel. As a result, counsel asked to be relieved. Appellant concurred in this request and it was granted.

Appellant was sentenced on count 1 to 25 years to life plus three years, consecutive to the sentence of 25 years to life plus nine years he was already serving in another case; the same sentence was imposed and stayed on count 2.

Appellant argues counsel infringed his right to self-representation and was ineffective. Neither of these contentions is persuasive. We will affirm.

¹ Unless otherwise specified, all statutory references are to the Penal Code.

FACTS

On March 17, 2008, appellant successfully exercised his right to self-representation. Edward L. Stoliker was appointed as stand-by counsel. On two occasions, appellant successfully obtained trial continuances.

On August 29, 2008, appellant filed a *Pitchess* motion.² On October 14, 2008, the parties appeared before Judge Thomas DeSantos. The court denied the *Pitchess* motion because it was untimely and the appropriate parties had not been served. On October 21, 2008, the parties appeared before Judge David Allen. During this proceeding, the court received a *Pitchess* motion for filing. On December 5, 2008, the parties appeared before Judge Peter Schultz. The court denied the *Pitchess* motion because appellant failed to properly notice it for hearing.³ Appellant subsequently noticed the *Pitchess* motion for hearing on December 5, 2008. On January 5, 2009, the *Pitchess* motion was denied by Judge Steven Barnes on the ground of untimeliness.

On December 15, 2008, the parties appeared before Judge Harry Papadakis. Both parties stated they were ready for trial. Appellant advised the court that he had motions ready to file and the court directed him to properly serve them. The trial confirmation hearing was set for January 5, 2009.⁴

On January 5, the parties appeared before Judge Barnes. Appellant stated that he was not prepared for trial and had not subpoenaed any witnesses. He asked for a continuance. The court asked appellant why he had not filed a continuance motion. Appellant stated that he had mailed a continuance motion. However, unspecified prison personnel were interfering with his mail. He also asserted that they were placing

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

³ Thereafter, appellant successfully challenged Judge Shultz for cause.

⁴ Henceforth, all dates refer to 2009 unless otherwise specified.

limitations on his free postage, only giving him two envelopes and providing inadequate library access. When the court asked appellant for a copy of his continuance motion, appellant stated that he did not have it with him because his cell had been raided by investigators for the prosecution who confiscated his legal materials. The court denied the continuance request.⁵

Trial commenced the following day. It was presided over by Judge Thomas DeSantos. At the outset of the proceedings, appellant orally requested transport orders for eight incarcerated defense witnesses. The court stated that appellant sent a witness list to the court on December 12, 2008, which included standby counsel, most of the attorneys in the District Attorney's office and all of the prison wardens. Appellant did not submit a declaration summarizing the expected contents of the testimony to be given by each witness. He did not subpoena any witnesses and did not file a written request for transport orders. Appellant replied that on December 23, 2008, he sent a motion listing inmates he wanted transported to court for trial. The court stated that such a motion would not have been timely. Appellant stated that he "had a phone call to the" defense investigator scheduled for December 5, 2008, but "the prison never honored that." During this phone call, he would have told the defense investigator "to have that all taken care of." The court stated it "doesn't have anything in the file that I can see concerning that." The court denied appellant's request for transport orders.

After the verdicts were returned, the court asked appellant if he wanted to be sentenced immediately. Appellant replied affirmatively but then stated that he wanted to move for a new trial "[b]ecause I'm challenging juror number 5." Appellant

⁵ In response, appellant called Judge Barnes "a cold piece of work" and wondered aloud "how much CCPOA is paying you." Appellant also said he was going to name Judge Barnes as a beneficiary in his will so that "we'll have a conflict of interest."

complained that he only received two hours of library time per week. He stated that a California Department of Corrections (CDC) regulation authorizes him four hours of library time per week. He asked the court to issue an order that he is to receive four hours of library time per week. The court stated that “the minute order should reflect defendant is entitled to receive his library time as set forth in the regulations.”

Sentencing was set for February 5.

On February 5, the parties appeared before Judge Timothy Buckley. The court asked appellant if he wanted a continuance so that the judge who presided over the trial could conduct the sentencing hearing. Appellant responded affirmatively. Also, appellant stated that he wanted to make a motion for new trial but he was not able to prepare it because he had been told by a librarian that he “needed a court order to get into the library.” Judge Buckley stated that “Judge DeSantos can correct whatever orders he made.” Sentencing was set for February 10.

On February 10, the parties appeared before Judge DeSantos. Appellant stated that he wanted to move for a new trial but had not been able to use the law library. The court granted a continuance. It also agreed to issue a minute order stating that appellant is “entitled to law library privileges per the CDC regulations.” Appellant argued that a CDC regulation allowed him four hours library time per week. The court replied, “That may be regulations and there may be exceptions to regulations, but I’m not going to get in to that.” The court stated that if appellant believed his rights were being infringed, he could file a petition for writ of habeas corpus. However, it would not issue an order to show cause at this time. Appellant said he would “do the habeas corpus on that.”

Sentencing was set for March 12.

On March 9, appellant filed a written “motion for appointment of counsel to file motion for new trial” (capitalization omitted). This motion was not accompanied by any supporting points and authorities.

On March 13, appellant appeared before Judge DeSantos. At the outset of the proceeding, the court asked appellant, "I have a filed motion for appointment of counsel to file motion for new trial in this matter; is that correct?" Appellant replied, "Yes, sir." The court stated, "Remember when you went in pro per you indicated that you were capable of doing all matters by yourself?" Appellant said, "Yeah, but --" The court asked, "What happened?" Appellant stated: "I tried to strike up the motions. I sent one. As a matter of fact, it should be on file, but the thing is to get the motion for the stuff for the rest of the new trial motions, it was different grounds. I'm going to need counsel to get it because I don't have access to the legal materials and cases that I need at the jail -- or at the prison."

Since Stoliker was no longer under contract with Kings County, the court appointed Brian Gupton to represent appellant. The court stated, "What I'll ... do at this point is appoint Mr. Gupton to represent the defendant for discussing the issue with you whether or not there are motions for new trial." It continued the matter for three weeks so Gupton would "have a chance to meet with Mr. Fields and determine whether you're going to go forward with sentencing or motion for new trial." Gupton stated this was "fine." The court asked appellant if he agreed. Appellant replied, "I need to know, is this going to be at the prison? I know [the other defense attorney] and all that. They don't come see their clients." The court replied, "That's because the prison doesn't let them in." Appellant responded, "In that event, can I confer with him? Give me [a] phone call to confer with him?" The court stated, "What's going to happen is basically I'll have him review the file and bring you back on a date when ... you guys can sit down [and] talk about the case." Appellant stated that there was "[nowhere] to talk back here where I can get my confidentiality." Gupton said, "We'll make arrangements for a private room."

Gupton also stated that appellant was holding some paperwork and asked if it was related to the new trial motion. Appellant answered, “This is one of the ones that should be on file already.” Gupton asked, “Would you like to provide me with those so I can review those? And do these contain some of your alleged grounds for a new trial?” Appellant replied affirmatively and said, “The only ones I don’t have are the judicial ones about the failure to grant my continuance to get my witnesses to court and [to] go to trial without my witnesses.” The court stated that “some of those issues may be appealable issues. Whether they’re grounds for [a] new trial is something else.” Gupton said, “Correct. I understand that, your Honor. And thank you for clarifying that for Mr. Fields.”

Gupton said that he would like an opportunity to review the file in this matter as well as appellant’s papers and asked for a date to be set during which he could confer with appellant in a semi-private area. The matter was continued to March 30.

On March 16, a written new trial motion was filed; it was prepared by appellant (the pro per new trial motion). In his supporting points and authorities appellant summarily asserted the prosecutor committed misconduct by failing to disclose internal affairs complaints and informal files about Maciel, Aguirre and Doug Sullivan⁶ and by failing to correct false testimony given by Sullivan.

On March 30, the parties appeared before Judge DeSantos. The court stated that at the last hearing appellant “requested an attorney be appointed to represent him for sentencing” and Gupton “was appointed.” The court stated that it was in receipt of the pro per new trial motion. Since it was filed after Gupton was appointed, the court was

⁶ Sullivan was a law library officer who testified that he saw appellant kicking in the direction of Maciel both before and after Maciel administered pepper spray to subdue appellant.

not going to address it. Rather, Gupton was to review it and determine whether it has “any type of merit for the Court to consider.”

Gupton stated that he had not yet assessed the allegations contained in the pro per new trial motion. Gupton stated that he “would note ... they’re conclusionary in nature, and I don’t know that this would rise to the grounds of requiring a new trial.”

Gupton also stated that he received “the main file in this case” that morning and had not yet had an opportunity to review it.

At this point, appellant interrupted by stating that Gupton told him the prison would not allow him to visit. However, he obtained a copy of the rules “and it’s mandatory for them to let the attorneys in” The court replied, “Okay. Go ahead, Mr. Gupton.”

Gupton stated that he wanted to assess the allegations contained in the pro per new trial motion to “determine on a threshold basis whether or not they amount for grounds for a new trial, and I’m in the process of doing that.” Gupton said he would not need a trial transcript since appellant represented himself at trial. However, appellant has “identified certain other dates that he believes there were meaningful discussions regarding some of the issues that he raises that were on the record.” Therefore, Gupton requested a docket of events in this case leading up to trial. The court ordered that a docket be prepared and provided to Gupton.

At Gupton’s request, the court agreed to continue the matter for three weeks. Gupton stated, “And in the meantime, I may even go down to see Mr. Fields or have an investigator go see him, one or the other, to get a little more detailed interview.”

The prosecutor stated that it would not respond to the pro per new trial motion at this time. The court responded, “Right. It would be up to Mr. Gupton to advise you that it needs to be put on calendar.” Gupton said, “And I may do that within the next three weeks, depending on what I find out between now and then.”

Then the prosecutor raised a different matter, stating that it wanted to respond to appellant's complaints that he was not receiving law library access. The prosecutor had obtained records establishing that appellant "has been getting the law library privileges almost on a weekly or every other weekly basis way back a number of months." Appellant said, "Except for Monday's." The court received these records into the file.

Gupton requested a copy of the probation report and the court stated it would ask the probation department to prepare a copy for him.

On April 29, the parties appeared for the final time before Judge DeSantos. At the outset of the proceeding, Gupton made the following comments:

"... I was appointed solely to investigate particularly Mr. Fields's request for motion for a new trial.

"I've reviewed documents in the file as well as Mr. Fields's] proposed motion for a new trial. At this point, your Honor, I do not find any -- first of all, there are no, can't be any ineffective assistance of counsel grounds since Mr. Fields represented himself at trial.

"Secondly, as Mr. Fields concedes in his proposed motion there are no statutory grounds that I find, and a review of the file reveals the same, nor do I find any non-statutory grounds that would present a viable motion for a new trial at this point.

"There are issues raised by Mr. Fields that may well be issues on appeal. But I am neither appointed in that matter nor am I prepared, or, frankly, I'm not an appellate attorney and not prepared to evaluate those types of issues."

Appellant obtained the court's attention and said:

"Can we get a ruling on my other motions? This guy here, you appointed this guy to send an investigator. That was the reason for the continuance, to talk to me. This man, I wrote you a letter. You should have got it. Anyway, it should have come yesterday. Anyway, I told you that this man hasn't sent nobody to the prison, investigator or nothing, to talk to me or to see what the claim was. What the claim was is where you didn't allow my witnesses in. That was one of the grounds that was going to be raised. I was going to provide his investigator with evidence of that.

“And also I wrote this man telling him that, you know, I felt that from the beginning his appointment was a farce and a sham based on the fact that he hasn’t made no contact as my counsel, he could have arranged a phone call to try to come to the prison. I tried [to] provide you with documents showing that he can get in the prison. He’s made no attempt to do none of this, you know, and now he comes to court today talking about there is no grounds, you know.

“I would like a copy of everything that he, you provided him with as far as the transcripts and all that. I would like a copy of all that stuff. Also I’m bringing a suit against this man for legal malpractice.”

Gupton replied, “Your Honor, at this point based on that last statement I request to withdraw as counsel.” Appellant replied, “Thank you.” The court asked appellant, “When did you bring the suit, Mr. Fields?” Appellant said he was going to file a lawsuit because neither Gupton nor an investigator visited him at the prison and Gupton “sprang on me that he’s going to say that there is no issues, no grounds or nothing, even though we both know that on the day of trial and before trial I asked for a continuance to get my witnesses to court on the court’s order, which was denied.”

The court asked Gupton what he relied on in reaching the conclusion that there were not any reasonable grounds for a new trial motion. Gupton stated that he reviewed the “entire file” provided by the court as well as the pro per new trial motion. Gupton stated that the assertions contained in the pro per new trial motion “may well be issues for appeal, but I do not believe in my professional judgment they rise to the level of grounds for a new trial.”

The court ruled as follows:

“[¶] As far as the motion or the request by Mr. Gupton, that is granted. He is relieved at this time. He has given the Court the necessary information that was -- that he was requested to do in this matter.

“The Court, on its own, had previously reviewed the [pro per new trial motion] I appointed Mr. Gupton and in his opinion there was no grounds for a motion for new trial indicating that it could be appellate

grounds, and the Court is in somewhat agreement in those issues, but not with respect to motions for new trial in the matter.

“At this point in time, those motions are denied.”

Gupton stated that appellant had requested his “work-product.” Since Gupton had been relieved, he asked the court if it would like him to deliver the case file to appellant at this time. Gupton said he would give it to the transport officers. The court asked appellant, “[Y]ou see the file being provided there?” Appellant replied affirmatively. Appellant then asked for “the discovery stuff that [he] never received from trial” The court replied, “You have the trial folders ... and all discovery that’s ... been provided, I’ve made all my trial rulings already, so anything else you need to do at the appellate level or through your other legal remedies.” Then the court proceeded with sentencing.

DISCUSSION

I. Appellant’s self-representation right was not infringed.

A. Gupton did not exceed his appointed role.

Appellant argues that Gupton “was appointed solely in an advisory capacity” and that Gupton improperly exceeded this “advisory role by representing [him] before the court,” thereby violating his right to self-representation. We are not persuaded.

A request for counsel is sufficient to constitute a waiver of self-representation. “A defendant’s invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense. Such participation also diminishes any general claim that counsel unreasonably interfered with the defendant’s right to appear in the status of one defending himself.” (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 182 (*Wiggins*)). Further, “[e]ven when [a defendant] insists that he is not waiving his *Faretta* rights, a *pro se* defendant’s solicitation of or acquiescence in certain types of participation by counsel substantially

undermines later protestations that counsel interfered unacceptably.” (*Ibid.*) As explained in *Wiggins, supra*, 465 U.S. 168:

“[¶] *Faretta* does not require a trial judge to permit ‘hybrid’ representation [I]f a defendant is given the opportunity and elects to have counsel appear before the court or jury, his complaints concerning counsel’s subsequent unsolicited participation lose much of their force. A defendant does not have a constitutional right to choreograph special appearances by counsel. Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant’s acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced.” (*Wiggins, supra*, 465 U.S. at p. 183.)

Having closely examined the record, we reject appellant’s assertion that Gupton was appointed in a limited capacity solely to “assist [appellant] in gaining access to legal research materials.” On March 9, appellant filed a written request for appointment of counsel to file a new trial motion. When appellant appeared on March 13, the court appointed Gupton “to represent [appellant] for discussing the issue with you whether or not there are motions for new trial.” Appellant did not object to or otherwise indicate to the court that he wanted Gupton to act solely as a legal assistant to help him prepare a new trial motion. Although appellant personally prepared the pro per new trial motion that was filed on March 16, he did not interpose any objection when the court declined to consider it on March 30. Appellant also did not object when the court stated during the March 30 proceeding that it was for Gupton to decide whether to notice a new trial motion for hearing. It is abundantly clear from appellant’s conduct and remarks during the many proceedings in this case that he knew how to object to a proposed ruling if he disagreed with it.

Appellant only represented himself at sentencing because he was angered by Gupton’s conclusion that there were not any reasonable grounds supporting a new trial motion, and threatened to sue Gupton, resulting in Gupton’s successful request to be

relieved. We agree with respondent that “appellant was unhappy with the *result* of [Gupton’s] participation rather than the *scope* of [Gupton’s] participation.”

Accordingly, we conclude Gupton did not exceed his appointed role in this matter.

B. Gupton did not act against appellant’s interests.

Next, appellant argues Gupton violated his self-representation right by informing the court that there was not a viable basis for a new trial motion. Appellant contends that Gupton “should have only stated that he had not found grounds in support of a new trial, *separate and apart from* grounds [advanced in the pro per new trial motion].” Appellant contends that Gupton’s actions denied him any opportunity to obtain a ruling on the pro per new trial motion and failed to act as a zealous and loyal advocate on his behalf. We are not convinced.

After Gupton was relieved, the court specifically stated that it had read and considered the pro per new trial motion. It did not find any of the arguments advanced therein to constitute a valid basis for a new trial and it denied the pro per new trial motion. Thus, Gupton did not preclude the trial court from considering the points raised in the pro per new trial motion or obtaining a ruling thereon.

Also, we find it significant that appellant has not advanced as appellate issues any of the claims raised in the pro per new trial motion or any of the many complaints appellant orally articulated during the posttrial proceedings. Appellant has not shown that there was any legal or factual basis supporting a viable new trial motion. While counsel must act as a zealous advocate, he or she is not required to advance baseless arguments. (*People v. Price* (1991) 1 Cal.4th 324, 387 (*Price*).)

Further, when a defendant chooses to be represented by counsel, it is counsel and not the defendant who is in charge of the case; the defendant “surrenders all but a handful of ‘fundamental’ personal rights to *counsel*’s complete control of defense strategies and tactics. [Citations.]” (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1163.)

Once appellant asked the court to appoint counsel to represent him, appellant surrendered control of the decision whether to file a new trial motion. “An accused who chooses professional representation, rather than self-representation, has no right to participate as cocounsel. [Citations.]” (*Id.* at p. 1162.) It was Gupton, not appellant, who was responsible for assessing and determining whether there existed a reasonable factual and legal basis for a new trial motion. As previously stated, Gupton did not have an obligation to advance factually baseless or legally meritless arguments. (*Price, supra*, 1 Cal.4th at p. 387.) Gupton did not argue against any points that were raised by appellant either in the pro per new trial motion or during appellant’s oral comments to the court at the various posttrial appearances. However, Gupton did not have a professional obligation to advance an assertion made by appellant that, in Gupton’s professional judgment, lacked merit.

Respondent correctly points our attention to *People v. Thurman* (2007) 157 Cal.App.4th 36 (*Thurman*). There, separate counsel was appointed after the verdict was entered to investigate possible grounds for a new trial motion. “After reviewing the [trial] transcripts, the attorney reported to the court that he did not see any grounds for a new trial motion.” (*Id.* at p. 44.) Defendant argued on appeal that counsel was required to file either a motion for new trial or a pleading consistent with *Wende/Anders*.⁷ The appellate court rejected this argument, reasoning:

“If any issue which can be raised in a motion for new trial is suggested by the record but trial counsel has failed to develop the record sufficiently to permit effective appellate review, the defendant’s right to review is still sufficiently protected without resort to an *Anders/Wende* procedure. A court-appointed appellate attorney has a duty to investigate any such issues which come to his or her attention during the course of

⁷ *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*); *Anders v. California* (1967) 386 U.S. 738 (*Anders*).

representing the client on direct appeal, and to file a petition for writ of habeas corpus if it appears that trial counsel's failure deprived the defendant of the effective assistance of trial counsel. [Citations.]

“Finally, extending *Anders/Wende* to new trial motions would in effect mandate that a motion for new trial or an *Anders/Wende* brief be filed in every criminal case: Counsel would either have to file a motion for new trial, or file an *Anders/Wende* brief detailing the issues considered. This would add significantly to the burden on the trial courts without enhancing the likelihood that meritorious issues will be presented and ruled upon.” (*Thurman, supra*, 157 Cal.App.4th at p. 47.)

In *Thurman*, the defendant also claimed that counsel was ineffective for failing to pursue a new trial motion. The appellate court disagreed, explaining that the defendant “does not point to any issues which could have been successfully raised in the new trial motion, and we must therefore presume that his attorney chose not to file a new trial motion he deemed to be without merit.” (*Thurman, supra*, 157 Cal.App.4th at p. 48.)

Essentially, appellant is arguing that Gupton was obligated to advance meritless arguments based solely on appellant's insistence that such contentions must be presented to the court. We discern no basis in law or equity compelling Gupton to raise points that have no legal or factual basis merely to appease his client. Just as in *Thurman*, Gupton did not infringe appellant's constitutional rights by informing the court that he did not find any legitimate basis supporting a new trial motion. Gupton was not obligated to advance the allegations that were summarily raised in the pro per new trial motion.

Under the facts presented in this case, we find that Gupton's decision not to file a new trial motion or to argue in favor of appellant's pro per new trial motion did not infringe any of appellant's constitutional rights. (*Thurman, supra*, 157 Cal.App.4th at p. 47.)

II. The ineffective assistance claim fails for lack of prejudice.

Finally, appellant argues Gupton was ineffective “by failing to have any consultation with his client on the new trial motion.” To prevail on an ineffective assistance claim, appellant bears the burden of establishing deficient performance under an objective standard of professional reasonableness and prejudice under the test of reasonable probability of a different outcome. (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.) “If the record on appeal fails to show why counsel acted or failed to act, the claim must be rejected on direct appeal, unless counsel was asked for an explanation but failed to give one or there simply could be no satisfactory explanation. [Citation.]” (*Thurman, supra*, 157 Cal.App.4th at pp. 47-48.) It is presumed on appeal “that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant decisions. [Citations.]” (*Id.* at p. 48.) There is no need to determine whether an attorney’s performance was constitutionally deficient when the claim can be resolved solely on the basis of the absence of prejudice. (*In re Jackson* (1992) 3 Cal.4th 578, 604.) As will be explained, this is such a case.

Here, just as in *Thurman*, appellant “does not point to any issues which could have been successfully raised in the new trial motion, and we must therefore presume that his attorney chose not to file a new trial motion he deemed to be without merit.” (*Thurman, supra*, 157 Cal.App.4th at p. 48.) Appellant has not demonstrated any way in which a personal conference with him would have resulted in the filing of a meritorious new trial motion or otherwise resulted in a reasonable probability of a more favorable outcome. Appellant has not presented any viable grounds for a new trial motion to this court. Therefore, we reject the ineffective assistance claim on the basis of lack of prejudice.

In any event, the record does not contain any evidence about the type or scope of communication that occurred between Gupton and appellant. Even if Gupton did not

personally confer with appellant, the record does not contain any indications that appellant possessed undisclosed but material information that would have affected Gupton's legal judgment that there was no viable basis for a new trial motion. Therefore, appellant also failed to establish that Gupton's alleged failure to confer with him constituted deficient performance.

DISPOSITION

The judgment is affirmed.

Levy, J.

WE CONCUR:

Ardaiz, P.J.

Gomes, J.